Honour Properties Sdn Bhd & Anor v Duniaga Sdn Bhd

HIGH COURT (PULAU PINANG) — COMPANIES WINDING UP NOS 28–43 OF 1997 AND 28–51 OF 1997
KAMALANATHAN RATNAM J
30 SEPTEMBER 2002

Land Law *— Housing developers — Breach of — Developer entered into settlement agreement to pay proceeds of balance of purchase price to third parties — Whether settlement agreement was in contravention of r 4 of the Housing Developers (Housing Development Account) Regulations 1991*

The petitioner applied to wind up the respondent under s 218(1)(e) of the Companies Act 1965. Two of the respondent's creditors opposed the winding up petition. One of them ('Ventures') was the main contractor in respect of the respondent's housing project. In the meantime, the house buyers applied for a stay of all proceedings until the certificates of fitness were issued. Then, on 12 June 1998, the parties arrived at a settlement agreement and recorded a consent judgment. Under the terms of the consent judgment, the house buyers agreed to pay the balance due on the purchase into a trust account, for distribution to various third parties. This was Ventures' application, inter alia: (a) to intervene; (b) for a declaration that the settlement agreement was invalid; and (c) for a declaration that a certain sum of money, constituting 15% of the total sale price of the housing project, be placed in the respondent's trust account.

Held, allowing the application:

(1) Rule 4 of the Housing Developers (Housing Development Account) Regulations 1991 ('the Regulations') imposed a mandatory obligation on the respondent to deposit all monies, whether in respect of instalments of purchase price or otherwise paid by a purchaser into a housing development account ('the account'). Rule 7 listed the grounds under which money from the account can be withdrawn and one of the grounds included payment for costs of carrying out, inter alia, soil investigations, earthworks and infra structure works. It would appear that Ventures, as the main contractor who carried out the building works had a right to claim from the account. The effect of the consent order was to direct the payment of the balance of the progress payment to third parties. As such, since the consent order had contravened the Regulations, it was invalid and accordingly should be set aside (see p 209D–G).

(2) The court can make the instant an interim order even though the winding up petition had not been heard yet (see p 210A).

(3) The moneys became due and payable into the account when the respondent acted pursuant to the housing developer's licence. Although the respondent's housing developer's licence had

expired subsequently, this did not mean that the moneys due under the sale and purchase agreements could not be paid into the account. In fact, it was specifically to tackle cases such as the termination or expiry of the developer's licence that the account was set up. This would ensure orderly collection of the balance of the purchase price and disbursement thereof under the specific grounds stated in r 7 of the Regulations (see p 211D–F).

[Bahasa Malaysia summary

Pempetisyen memohon untuk menggulung responden di bawah s 218(1)(e) Akta Syarikat 1965. Dua daripada pemiutang responden telah menentang petisyen penggulungan tersebut. Salah satu daripada mereka ('Ventures') merupakan kontraktor utama berhubung dengan projek perumahan responden. Sementara itu, pembeli-pembeli rumah telah memohon untuk penggantungan kesemua prosiding sehingga sijil layak menduduki dikeluarkan. Kemudiannya, pada 12 Jun, 1998, pihak-pihak tersebut telah mencapai satu perjanjian penyelesaian dan telah mencatatkan satu penghakiman persetujuan. Di bawah terma-terma penghakiman persetujuan tersebut, pembeli-pembeli rumah telah bersetuju untuk membayar baki yang kena dibayar atas pembelian tersebut ke dalam satu akaun amanah, untuk pengagihan kepada pelbagai pihak-pihak ketiga. Ini adalah permohonan Ventures, antara lainnya: (a) untuk mencelah; (b) untuk suatu pengisytiharan bahawa perjanjian penyelesaian tersebut adalah tidak sah; dan (c) untuk suatu pengisytiharan bahawa satu jumlah wang yang tertentu, yang menjadikan 15% dari jumlah harga jualan projek perumahan, hendaklah diletakkan di dalam akaun amanah responden.

Diputuskan, membenarkan permohonan tersebut:

(1) Kaedah 4 Peraturan-Peraturan Pemaju Perumahan (Akaun Pembangunan Perumahan) 1991 ('Peraturan-Peraturan tersebut') mengenakan kewajipan mandatori ke atas responden untuk mendepositkan kesemua wang, sama ada berhubung ansuran-ansuran harga belian atau sebaliknya dibayar oleh seorang pembeli ke dalam akaun pembangunan perumahan ('akaun tersebut'). Kaedah 7 menyenaraikan alasan-alasan di bawah yang mana wang daripada akaun tersebut boleh dikeluarkan dan salah satu daripada alasan-alasan tersebut termasuk pembayaran bagi kos menjalankan, antara lainnya, penyelidikan tanah, kerja-kerja tanah dan kerja-kerja infrastruktur. Adalah nampaknya bahawa Ventures, sebagai kontraktor utama yang telah menjalankan kerja-kerja pembinaan berhak untuk menuntut daripada akaun tersebut. Kesan perintah persetujuan tersebut adalah untuk mengarahkan pembayaran baki bayaran kemajuan kepada pihak-pihak ketiga. Yang demikian, oleh kerana perintah persetujuan tersebut telah melanggar Peraturan-Peraturan tersebut, ianya adalah tidak sah dan sehubungan itu haruslah diketepikan (lihat ms 209D–G).

(2) Mahkamah boleh membuat perintah interim semasa meskipun petisyen penggulungan masih belum didengar lagi (lihat ms 210A).

(3) Wang tersebut menjadi kena dibayar dan terhutang ke dalam akaun tersebut apabila responden bertindak selaras dengan lesen pemaju perumahan. Meskipun lesen pemaju perumahan responden telah luput berikutan itu, ini tidak bermakna bahawa wang yang kena dibayar di bawah perjanjian-perjanjian jual beli tidak dapat dibayar ke dalam akaun tersebut. Pada hakikatnya, akaun tersebut telah ditubuhkan, secara khususnya untuk menyelesaikan kes-kes seperti penamatan atau peluputan lesen pemaju. Ini akan memastikan pengutipan teratur baki harga belian dan perbelanjaannya di bawah alasan-alasan khusus tersebut yang dinyatakan di dalam k 7 Peraturan-Peraturan tersebut (lihat ms 211D–F).]

Notes

For cases on housing developers generally, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2432–2477.

Cases referred to

Badiaddin bin Mohd Mahidin & Anor v Arab-Malaysian Finance Bhd [1998] 1 MLJ 393 (refd)

See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors [1995] 3 MLJ 598 (refd)

Legislation referred to

Companies Act 1965 ss 218(1)(e), 218(2)(a), 221

Housing Developers (Control and Licensing) Act 1966 ss 7A, 24

Housing Developers (Housing Development Account) Regulations 1991 rr 4, 7

Ramsun Ho Chii Huey (*Lim Huck Aik & Co*) for the applicant.

SC Chew (*Chew Sien Chee & Co*) for the respondent.

M Thayalan (*Thayalan & Assoc*) for the petitioner in Companies Winding Up No 28–51 of 1997.

Ooi Teik Ho (*Ooi Lee & Co*) for the petitioner in Companies Winding Up No 28–43 of 1997.

Kamalanathan Ratnam J:

Facts

The petitioner, Honour Properties Sdn Bhd, applied (Winding Up Petition No 28-43-97) to wind up Duniaga Sdn Bhd ('Duniaga'), a housing developer, pursuant to s 218(1)(e) and (i) of the Companies Act 1965 on the basis that Duniaga was indebted to the petitioner in the sum of RM126,417.68 as at 25 November 1995 together with interest thereon at

10% pa and costs of RM1,554 pursuant to a judgment pronounced on 20 June 1997 in the Sessions Court at Butterworth vide Summons No 52–134–97. Alternatively, the petitioner sought to wind up Duniaga pursuant to s 218(2)(a) of notice of demand. Three other creditors, namely, Smart Ventures Sdn Bhd ('Ventures'), Koay Heng Siew Co Sdn Bhd ('Koay') and Resvent Sdn Bhd ('Resvent') gave notice of their intention to attend the hearing of the petition on 21 January 1998. Ventures and Resvent opposed the winding up petition. Duniaga had granted Ventures various contracts upon a project called Halaman Damai Project; hence its intention to oppose. In the meantime, the purchasers of various units in the Halaman Damai Project through its Chairman, Teoh Kim Huat ('Teoh') and representing all other 167 purchasers of various units applied for a stay of all proceedings until the relevant certificates of fitness, in respect of the units they had purchased from Duniaga as vendor and developer, were issued. Teoh also filed an application to oppose the winding up petition.

On 12 June 1998, by consent, the parties arrived at a settlement and recorded consent judgment. All the purchasers of the Halaman Damai Project agreed through their representatives to pay up the balance 20% due on the purchase into a trust account to be operated by the petitioner's solicitors. It was also a term of the settlement that out of the sum of RM2,941,407 to be collected as balance from the purchasers, 75% of the said sum was to be distributed as follows:

(1) Koay — RM393,000;

(2) Petitioner — RM114,000;

(3) Resvent — RM325,000; and

(4) the balance 25% of the sum collected to be paid to Ventures in full settlement of the debt due. There were also other incidental and consequential orders.

After the settlement order was extracted, Teoh affirmed an affidavit on 22 October 1998 in which he disclosed that Duniaga had in fact entered into an agreement with Perbadanan Pembangunan Bandar (UDA) as owners and Duniaga as the developer. The said agreement was dated 10 December 1990. UDA which owned the lands on which the Halaman Damai Project was being constructed agreed to transfer the said lands to Duniaga for a sum of RM7,984,000. The said sum was to be paid progressively within four years. Duniaga failed to do so. UDA and Duniaga then entered into a supplemental agreement on 16 December 1995 whereby in forbearance of UDA initiating legal action, Duniaga agreed to settle the balance due and to complete the development of the various projects agreed to in the principal agreement within an extended three years. Again, Duniaga failed to honour the supplemental agreement. Parties then entered into a second supplemental agreement on 26 March 1997 which gave Duniaga a further six months on this extension. Duniaga again was unable to complete the Halaman Damai Project within the extended six months. The parties then entered into another supplemental agreement. By this agreement UDA agreed to grant Duniaga a loan of RM2,400,000 to

A complete the said project progressively. Duniaga again failed to complete. UDA then terminated all agreements and sued for the full sum inclusive of the loan of RM2,400,000 vide Pulau Pinang High Court Civil Suit No 22–788–98 and took possession of its lands.

Teoh thus contended in his affidavit that since Duniaga's services had been terminated by UDA and since Duniaga was in no position to hand over the completed units to the buyers, the buyers were not prepared to pay the balance of 20%. Since the settlement agreement was entered into without knowing these facts Teoh averred that the settlement agreement ought to be varied in that, that part of the order requiring the purchasers to pay the 20% ought to be set aside. A notice of motion to this effect was filed by Teoh's solicitors. The petitioner, of course, opposed this and contended it was too late in the day for the purchasers to recant. However by consent the said motion was struck out.

In respect of Winding Up Petition No 28–51–97 filed by Koay against Duniaga the claim was for RM412,198.28 as at 3 December 1997 with continuing interest at 8%pa on the sum of RM393,401.25 from 4 December 1997 pursuant to a judgment of the High Court at Penang vide CS No 22–126–97 obtained on 4 August 1997. There was no response from Duniaga to a s 218 notice from Koay.

Duniaga

On 3 July 2002, Malayan Banking Bhd applied by way of encl 44, Malaysia Building Society Bhd ('MBSB') by way of encl 47, Affin Bank Bhd by way of encl 56 and Southern Bank Bhd by way of encl 68 applied to intervene. In all these applications the respondent was absent although served with the relevant cause papers. I granted orders in terms of encll 44, 47, 56 and 68.

Findings of the court

Enclosure 68 was partially contested on 4 July 2002. This was an application by Ventures for the following orders:

(a) to intervene;

(b) for a declaration that the settlement agreement dated 12 June 1998 is invalid;

(c) that the said settlement agreement dated 12 June 1998 be either set aside or cancelled;

(d) for a declaration that the sum of RM2,206,055.25 which is 15% of the total sale price of the units of Halaman Damai Project is trust money which ought to be placed in the trust account of the respondent held in Malayan Banking Bhd, Gelugor Branch, Pulau Pinang vide account No 007152–60002–6;

(e) that all purchasers of the units, all banks and financial institutions including the Malaysian Government that had loaned money to the purchasers, in respect of the Halaman Damai Project in respect of the sales of units entered into between the said purchasers and the

respondent amounting to RM2,206,055.25 do pay their respective balances into the trust account of the respondent held in Malayan Banking Bhd, Gelugor Branch Pulau Pinang vide account No 007152–60002–6;

(f) costs;

(g) such further or other relief this court deems fit and proper.

In its supporting affidavit to the said application Ventures' director pointed out that pursuant to the Housing Developers (Housing Development Account) Regulations 1991 the respondent had to open a trust account which the respondent did at Malayan Banking Bhd, Glugor Branch, vide account No 007152–60002–6. Ventures were the main contractors in respect of the Halaman Damai Project to be built by the respondent on land belonging to UDA and although Ventures had completed all its works and had obtained the certificate of fitness the respondent still owned Ventures RM2,111,516.12. This, Ventures contended, ought to be paid into the Housing Development Account pursuant to s 7A of the Housing Developers (Control and Licensing) Act 1966 which reads as follows:

Section 7A

(1) Subject to sub-section (9), every licensed housing developer shall open and maintain a Housing Development Account with a bank or finance company for each housing development undertaken by the licensed housing developer.

(2) Where a housing development is to be developed in phases, the licensed housing developer shall open and keep a Housing Development Account under sub-section (1) for each phase of such housing development.

(3) The licensed housing developer shall pay into the Housing Development Account of a housing development the purchase monies received by the licensed housing developer from the sale of housing accommodation in the housing development and any other sum or sums of money which are required by regulations made under this Act to be paid into the Housing Development Account.

(4) The licensed housing developer shall not withdraw any money from the Housing Development Account except as authorized by regulations made under this Act.

(5) Subject to sub-section 6(b), all monies in the Housing Development Account shall, notwithstanding any other written law to the contrary, be deemed not to form part of the property of the licensed housing developer in the event:
   (a) the licensed housing developer enters into any composition or arrangement with his creditors or has a receiving order or an adjudication order made against him; or
   (b) the licensed housing developer, being a company, goes into voluntary or compulsory liquidation.

(6) Upon the happening of any of the events referred to in sub-section (5):
   (a) the monies in the Housing Development Account shall vest in the official receiver, trustee in bankruptcy or liquidator as the case may be, to be applied for all or any of the purposes for which monies in the Housing Development Account are authorized by regulations made under this Act to be withdrawn; and

A (b) any money remaining in the Housing Development Account, after all payments have been made pursuant to paragraph (a) of all liabilities and obligations of the licensed housing developer under the sale and purchase agreements in respect of the housing development have been fully discharged and fulfilled, shall be held by the official receiver, trustee in bankruptcy or liquidator as the case may be, as money belonging to the licensed housing developer to be applied in accordance with the law relating to bankruptcy of or the winding up of a company.

(7) ...

(8) ...

C (9) ...

(10) Any housing developer who contravenes or fails to comply with this section shall be guilty of an offence and shall, on conviction, be liable to a fine which shall not be less than ten thousand ringgit but which shall not exceed one hundred thousand ringgit and shall also be liable to imprisonment for a term not exceeding three years or to both.

D It is also necessary to refer to rr 4 and 7 of the Housing Developers (Housing Development Account) Regulations 1991 made pursuant to s 24 of the Housing Developers (Control and Licensing) Act 1966. Rule 4 imposes a mandatory obligation on the respondent to deposit all monies whether in respect of instalments of purchase price or otherwise paid by a purchaser E into the Housing Development Account. Rule 7 lists 15 grounds under which money from the Housing Development Account can be withdrawn and it would seem that pursuant to sub-cl (e), which provides for payment for cost of carrying out soil investigations, earthworks, foundation works, building works, external works, site and boundary survey for each lot, infrastructure works, relocation of squatters and other works, Ventures as the F main contractor who carried out the building works has a right to claim from this Housing Development Account.

Having read the numerous affidavits and the law relating to this issue, it is my judgment that the effect of the consent order entered into on 12 June 1998 is to direct the payment of the penultimate 15% of the progress G payment, which should be paid into the respondent's Housing Development Account, to be paid to third parties including Ventures. I hold that the said consent order is invalid as expressly contravening the statutory provisions and is therefore illegal. In *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393, the Federal Court held that whilst it is settled law that one High Court cannot set aside a final order H regularly obtained from another High Court of concurrent jurisdiction, as in this case, the one special exception to this rule is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction. The Court of Appeal also held that the application to set aside must be done 'within the same proceeding or action in which the same order was obtained and not in a separate fresh proceedings or new I action ...'. In the light of this authority, I do hereby set aside the consent judgment dated 12 June 1998 on grounds of illegality in that the said balance ought to be paid into the Housing Development Account of the

respondent held in Malayan Banking Bhd, Gelugor Branch, Pulau Pinang vide account no 007152–60002–6.

There is one other issue to which I must address myself: Since the winding up petition has not been heard as yet can this court make interim orders? Section 221 of the Companies Act 1965 gives this court the power to make such interim or other orders that it thinks fit. In fact, in *See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors* [1995] 3 MLJ 598 (CA), the Court of Appeal held that whilst the only final order a court hearing a winding up petition could make is either to direct a winding up or to dismiss the petition, it may make interim orders, eg by appointing a provisional liquidator or a receiver and manager, pending the final disposal of the petition, but it may not make an order as to the distribution or disposal of the assets of a company.

Both the petitioners had no objection to Ventures' application. Malayan Banking Bhd and MBSB also had no objection but reserved their right to apply to vary if necessary. However UDA objected only in respect of prayers (d) and (e). Mr Oh or UDA argued that since the licence of the respondent as shown in the exhibit to the affidavit in support had expired on 21 February 1997, it was no longer a licensed housing developer. Mr Oh referred to s 7A(3) of the Housing Developers (Control and Licensing) Act 1966 and argued that the said section would seem to indicate that it would apply to a practising licensed housing developer. Such an argument is fallacious. The moneys became due and payable into the Housing Development Account when the respondent acted pursuant to the licence granted to him. If half-way through, his licence is terminated or it expires, that does not mean that the moneys due under the sale and purchase agreement cannot be paid into the trust account. In fact it is specifically with a view to tackling cases such as these when the developer' s licence expires or is terminated that this Housing Development Account was set up. This will ensure orderly collection of the balance of the purchase price and orderly disbursement only under the 15 grounds set out earlier.

Having heard arguments, I granted an order in terms of prayers (a), (b), (c), (d) and (e)

In the exercise of my discretion, I made no order as to costs. I also ordered that the official receiver be appointed the provisional liquidator to handle the affairs of the respondent until the hearing of the winding up petition.

Application allowed.

Reported by Lim Lee Na